IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
APPELLANT,	)	
	)	
vs.	)	**No. SC83485**
	)	
ANDRE COLE,	)	
	)	
RESPONDENT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE DAVID LEE VINCENT, JUDGE

APPELLANT'S REPLY BRIEF

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murder her without first killing Curtis, and that he coolly reflected upon the murder of Curtis at that time" is predicated on speculation.

State v. McDonald, 661 S.W.2d 4976 (Mo. 1983);

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Point 1B - Replying to Respondent's Point IB: Respondent's point (that appellant's sentence of death is not excessive or disproportionate) and argument (that the Court's proportionality review is not Constitutionally required and need not conform to any Constitutional standards) must fail because, contrary to respondent's argument, since the due process clause requires, at a minimum, that an appellate court perform *de novo* review of punitive (monetary) damage awards in civil cases to ensure that they are not disproportionate, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.; BMW of North America, Inc. v. Gore,* then the due process clause can require no less in cases in which the punishment imposed on the defendant is death than that the Court review to ensure that the death sentence is not disproportionate.

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994);

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996);

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State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

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State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999).

Point 3- Replying to Respondent's III: The Court should reject respondent's Point III and argument and review appellant's Point 3 in that imposition of an unauthorized sentence and conviction of an offense not charged are matters that constitute plain error. *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Jones v. United States,* 526 U.S. 227 (1999) are contrary to the sentence and judgment in the present case, and as neither *Apprendi* nor *Jones* involved a case in which a death sentence had been imposed, respondent's claim that those cases do not apply to

death cases is based on dicta and not the holdings of *Apprendi* or *Jones*.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1999);

Point 4 - Replying to Respondent's VI: Appellant's claim is not foreclosed by §494.480.4 because that statute violates both the state and federal constitutions.

Kilmer v. Mun, 17 S.W.2d 545 (Mo. banc 2000);

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ARGUMENT

As to Point 1A: Contrary to respondent's argument, Andre's intent toward his ex-wife Terri, assuming only for the sake of argument that he "coolly reflected" on killing her, does not prove or give rise to an inference that Andre "coolly reflected" on killing Curtis whom Andre saw for the first time when he entered Terri's house in that Andre had no long-standing grievance, antagonism or other motive for killing Curtis, Andre's state of mind upon entering Terri's house was pure rage. Even if Andre "realized" that he would have to kill Curtis so he could kill Terri, this proves only a "knowing" or "purposeful" killing because there is no proof of cool reflection. One can only find that Andre deliberated on killing Curtis if one is allowed to infer cool reflection from a knowing, intentional, purposeful killing. Even a substantial, multiple, number of wounds or injuries is not sufficient to prove cool reflection. Respondent has not cited any authority to support that proposition

or to support respondent's claim that deliberation as to one person - here, Terri - proves deliberation as to a second person - Curtis. Respondent's argument that "[t]he jury could reasonably infer that, upon encountering Curtis in his ex-wife's house, he realized that he could not murder her without first killing Curtis, and that he coolly reflected upon the murder of Curtis at that time" is sheer speculation.

Respondent's argument - that notwithstanding Andre's "longstanding anger about paying child support" he coolly decided to murder Terri and "engaged in the same cool reflection with regard to Anthony Curtis upon discovering Curtis in the house" (Resp.Br.32) suffers from overlooking the state's own evidence concerning Andre's enraged state of mind at the time of the offense. This included testimony from Andre's co-workers about Andre's anger at having to pay child support (T871-73, 881, 885), Terri's testimony that Andre was angry, yelling, and cursing when he entered her house (T917-18), and the prosecutor's opening statement and argument about Andre's growing rage regarding having to pay child support and his boiling mental state at the time of the incident (T584-85, T1417, 1422, 1426, 1429, 1431, and 1435).

Assuming for argument that Andre coolly reflected on killing Terri, '"deliberation" requires cool reflection on taking the life of a specific person.' ***State v. McDonald***, 661 S.W.2d 4976, 501 (Mo. 1983). The fact that Andre may have coolly reflected on taking Terri's life, and the extent of that cool reflection, is irrelevant in establishing deliberation as to taking Curtis' life.

Under the state's theory, advanced through the evidence of the state's own witnesses and the prosecutor's statement and argument, *supra*, Andre - enraged - as he approached

and entered the house would have had to suddenly put a lid on his anger and somehow transform his state of mind to become coolly reflective when - for the first time - he encountered Curtis in Terri's house. Even if, theoretically, such rapid transformation was possible, neither the facts and circumstances described by Terri nor any other evidence demonstrates that this change occurred, and the state proffers no facts showing such change in mental state occurred.

Respondent argues, "multiple wounds or repeated blows may support an inference of deliberation" (Resp.Br.30). But respondent overlooks that absent "cool reflection," multiple wounds and repeated blows do not establish the element of deliberation. The cool reflection required for deliberation "may be brief, but it cannot be nonexistent." ***State v. Ervin***, 979 S.W.2d 149, 167 (Mo.banc 1998) Wolff, J., concurring in part and dissenting in part. In the present case, the state's evidence showed that Andre was anything but coolly reflective.

Respondent cites to ***State v. Davis***, 400 S.W.2d 141, 145-46 (Mo. 1966) to support his argument that Andre deliberated before killing Curtis (Resp.Br.32). But ***Davis*** cited with approval the definition of deliberation from the earlier case of ***State v. Davis***, 226 Mo. 493, 126 S.W. 470 (Mo. 1910) in which the Court said that deliberation "'"means a conscious purpose to kill, formed in a cool state of blood, and not under violent passion suddenly aroused by some real or supposed grievance."'" 126 S.W. at 477. And the later ***Davis***, cited by respondent, concluded that "[u]nder the authorities it appears that a finding of deliberation depends not so much upon the time element as it does upon an inference, reasonably drawn from the evidence, that the defendant performed the act in a

cool and deliberate state of mind." 400 S.W.2d at 146. Neither ***Davis*** case helps respondent. Nor do the other cases respondent cited (Resp.Br.32).

In sum, the state did not prove a reasonable doubt that Andre coolly reflected on killing Curtis. Respondent's point and argument must fail. The Court must either remand for a new trial or, in the alternative, enter a conviction for the lesser offense of "knowing" second degree murder, §565.021.1(1). *See* ***State v. O'Brien***, 857 S.W.2d 212, 220 (Mo.banc 1993).

<u>As to Point 1B</u>: Respondent's point (that appellant's sentence of death is not excessive or disproportionate) and argument (that the Court's proportionality review is not Constitutionally required and need not conform to any Constitutional standards) must fail because, contrary to respondent's argument, since the due process clause requires, at a minimum, that an appellate court perform *de novo* review of punitive (monetary) damage awards in civil cases to ensure that they are not disproportionate, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.; BMW of North America, Inc. v. Gore*, then the due process clause can require no less in cases in which the punishment imposed on the defendant is death than that the Court review to ensure that the death sentence is not disproportionate.

Contrary to respondent's argument (Resp.Br.33), appellate review of the proportionality of a sentence of death is constitutionally required. Respondent claims that ***Pulley v. Harris***, 465 U.S. 37 (1984) "held that proportionality review is not constitutionally required in an otherwise valid capital sentencing scheme" (Resp.Br.33-34, n.3). In fact, the holding was not quite so broad. The question presented in ***Pulley v.***

Harris was whether the Eighth Amendment required proportionality review, and the Court held that it did not. ***Id.*** at 43-44, 50-51. The Court in ***Pulley v. Harris*** was not faced with a claim that the Fourteenth Amendment's Due Process clause required proportionality review and did not address that question.

In ***Honda Motor Co., Ltd. v. Oberg***, 512 U.S. 415 (1994) the United States Supreme Court held that the "denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment." ***Id***. at 432. Subsequently, in ***BMW of North America, Inc. v. Gore***, 517 U.S. 559 (1996), the Court held that punitive damages that are "grossly excessive" violate due process. ***Id***. at 574-75 Most recently, in ***Cooper Industries, Inc. v. Leatherman Tool Group***, 532 U.S. 424, 121 S.Ct. 1678 (2001), the Court ruled that the Due Process Clause requires that in "reviewing the constitutionality of the imposition of punitive damages… an appellate court's review is *de novo*." ***State v. Black***, 50 S.W.3d 778, 794 (Mo.banc 2001) *citing* 121 S.Ct. at 1683, Wolff, J., dissenting. "The *de novo* review required by the ***Cooper Industries*** reasoning involves a dispassionate review of the punishment." ***Id***. "If that kind of protection is to be afforded to corporate defendants under a due process standard, individuals facing death sentences should be afforded no less due process." ***Id***.

"A jury's decision to impose "punitive damages is an expression of its moral condemnation." ***Cooper Industries,*** *supra*, 121 S.Ct. at 1683. A jury's verdict of death in a murder case similarly reflects a moral, rather than factual, judgment.

The "guideposts" identified by the Supreme Court to be used in determining whether an award of punitive damages is grossly excessive include: the degree of reprehensibility

of the wrongdoer, the relationship between the harm suffered by the victim and the punitive damages awarded, and "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." ***BMW***, *supra*, 517 U.S. at 574-75. These three guideposts are not unlike the review commanded by §565.035.3(3) which directs the Court to consider: "Whether the sentence of death is excessive or disproportionate to the penalty imposed in ***similar cases***, considering both the crime, the strength of the evidence and the defendant" (emphasis added).

BMW suggests that in its §565.035.3(3) review," this Court should be considering not only cases in which the death penalty was imposed, but also all cases with similar facts. *See*, ***BMW***, 517 U.S. at 583-85. "In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." ***Id***., 517 U.S. at 583-84. And, contrary to respondent's claim that ***Cooper Industries*** "has nothing whatsoever to say" regarding an appellate court's consideration, during proportionality review, of the effect of trial court errors (Resp.Br.34, n.4), ***Cooper*** indicates that in conducting its *de novo* review, Court will necessarily consider legal errors that occurred during trial that may have affected the outcome. 121 S.Ct. at 1688.

The recent Supreme Court cases regarding punitive damages, including ***Honda***, ***BMW*** and ***Cooper***, addressed what the Due Process Clause requires in punitive damage cases where a civil litigant challenges the Constitutionality of a monetary award - not what §565.035.3(3) requires. It is inconceivable that under the Due Process Clause, a sentence of death would be subject to a review less rigorous, comprehensive and thorough.

Cooper recognized, in performing its de novo review, the appellate court will necessarily consider legal errors that occurred during the trial that may have affected the outcome.

Appellant respectfully requests that the Court review, under the ***de novo*** standard of review and consistent with the requirements of the Due Process Clause, the Constitutionality of the death sentence imposed in this case considering, among other factors all cases - not just death cases - with similar facts. When the Court has done so, appellant believes that the Court will conclude that the sentence of death must be set aside and a sentence of life imprisonment imposed.

As to Point 2: **Respondent's point and argument - that the Court should not review appellant's Point 2, or should only review for plain error, because it challenged a series of unobjected-to improper actions and arguments by the prosecutor during guilt phase closing argument because trial counsel may have had strategic reasons for not objecting and in any event the prosecutor did nothing wrong - must fail. Respondent has not identified any strategic reasons for trial counsel's failure to object, and each matter challenged by appellant was improper and prejudicial. If the prosecutor's improper actions do not constitute a miscarriage of justice when considered individually, when the combined effect of the improper comments is considered, it is manifest that the totality of the argument has worked an injustice.**

Although respondent proffers the possibility that defense counsel at trial had "strategic" reasons for failing to object to prosecutorial argument damaging to the defendant, respondent is silent as to what possible strategic reasons could have existed (Resp.Br.38). Further, respondent's arguments as to why the actions and argument

challenged in this appeal were proper are unpersuasive and must fail.

The prosecutor made speculative arguments and presented irrelevant evidence suggesting Terri feared Andre would commit future crimes. According to respondent, there was no error in the prosecutor eliciting that after the incident Terri stayed with her sister until Andre was in custody, or arguing *not just* that Terri was afraid, but that "she didn't know if [Andre] was coming back" (T1434, Resp.Br.39). Respondent ignores the difference between the unobjectionable - description of Terri's appearance and demeanor, and the objectionable - going on to inject the possibility that Andre would commit future crimes.

State v. Morrow, 968 S.W.2d 100 (Mo.banc 1998) cited by respondent, is inapposite. As the Court explained, in ***Morrow*** the witness's fear was relevant to explain her actions. ***Id***. at 113. Further, there is absolutely no indication that the prosecutor in ***Morrow*** prejudiced the defendant by speculating that the witness feared future crimes by the defendant. ***Id***.

Attempting to downplay the prejudice engendered by the prosecutor's guilt phase closing argument, respondent overlooks that the prosecutor actually told the jury that he could not think of a more important case and the basis for the prosecutor's opinion was not in the record. This case, therefore, is like ***State v. Storey***, 901 S.W.2d 886 (Mo.banc 1995) and not like ***Bucklew v. State***, 38 S.W.3d 395 (Mo.banc 2001), cited by respondent, in which the prosecutor simply told the jury that the defendant was a sociopathic killer who deserved the death penalty. Here, the prosecutor's comment did not offer the explanation respondent has offered on appeal: that "no prosecution can be

more important to the citizens of any community than one in which the state charges the defendant with first degree murder and seeks the death penalty" (Resp.Br.40).

Respondent attempts to distinguish ***State v. Storey***, *supra*, by arguing that there were 'a series of "egregiously" improper arguments' in that case (Resp.Br.40-41). Either ***Storey*** was also "multifarious" or this argument proves too much in that it undercuts respondent's complaint that appellant should not have presented the errors in closing argument in one point.[1]

Further, the prosecutor's statement that there was not a more important case was not only prejudicial in and of itself, but when combined with the prosecutor's argument that Andre was a "convicted killer," the statement becomes especially prejudicial because it

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[1] Appellant's Point Two was that the trial court erred in allowing the prosecutor at guilt phase to deliberately inject evidence and make arguments that would lead the jury to ignore the evidence of record and improperly base their verdict on speculation, the prosecutor's knowledge, the defendant's propensity for committing crimes, and sympathy for the victim. Respondent cites ***State v. Thompson***, 985 S.W.2d 779, 784 n. 1 (Mo.banc 1999) to support his claim that appellant's Point Two 'is an extreme example of a point containing "multifarious" allegations of error in violation of Supreme Court Rule 30.06' (Resp.Br. at 37), but appellant's point hardly compares with this Court's description of the error in ***Thompson***: 'Most notably, defendant's numerous assertions of error are lumped into twelve groups, with each of the groups being characterized as a point relied on. Into these twelve "points," defendant loads not fewer than forty allegations of trial court error.'

explains why the prosecutor would say that no case was more important.

"Misstatement" or not, the prosecutor's admittedly erroneous reference to Andre as a "convicted killer" was egregiously prejudicial.

Respondent concedes that the prosecutor's reference to Andre as a "convicted killer" was error but claims that it could not have been prejudicial because none of his prior convictions, which were presented to the jury, involved a homicide. How could the jury possibly know that Andre had no other convictions?!? The jury was not instructed or admonished that they had been told of all of Andre's prior convictions or that Andre had never killed anyone! Suffice it to say that the errors in ***State v. Ferguson***, 20 S.W.3d 485, 502-03 (Mo.banc 2000) and ***State v. Debler***, 856 S.W.2d 641 (Mo.banc 1993) were hardly comparable to the misstatement in the present case which told the jury that Andre had killed before.

As to Point 3: **The Court should reject respondent's Point III and argument and review appellant's Point 3 in that imposition of an unauthorized sentence and conviction of an offense not charged are matters that constitute plain error. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999) are contrary to the sentence and judgment in the present case, and as neither *Apprendi* nor *Jones* involved a case in which a death sentence had been imposed, respondent's claim that those cases do not apply to death cases is based on dicta and not the holdings of *Apprendi* or *Jones*.**

Respondent contends that "the only issue addressed by the Supreme Court in ***Apprendi*** was what facts must be found by a jury at trial" (Resp.Br.51). But here is how

the Supreme Court, itself, framed the issue presented in ***Apprendi v. New Jersey***, 520 U.S. 466 (2000):

> It is appropriate to begin by explaining why certain aspects of the case are not relevant to the narrow issue that we must resolve. First, the State has argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received; Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. Brief for Respondent 4. The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, *given that it was above the 10-year maximum for the offense* ***charged in that count***.

Apprendi, 530 U.S. at 474 (emphasis added).

Apprendi reaffirmed ***Jones***:

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in ***Jones v. United States***, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases

> the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Id***., at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 475-76.

Suffice it to say that ***Apprendi*** not only relied on and reaffirmed ***Jones***, it relied on and reaffirmed a long line of cases concerning indictments:

> The rule was succinctly stated by Justice Clifford in his separate opinion in ***United States v. Reese***, 92 U.S. 214, 232-33, 23 L.Ed. 563 (1875): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."

Apprendi, 530 U.S. at 490, n. 15.

Finally, as neither ***Apprendi*** nor ***Jones*** involved a case in which a death sentence had been imposed, respondent's claim that those cases do not apply to death cases is based on dicta and not the holdings of ***Apprendi*** or ***Jones***.

<u>As to Point 4</u>: Appellant's claim is not foreclosed by §494.480.4 because that statute violates both the state and federal constitutions.

Section 494.480.4 is unconstitutional because it violates the defendant’s rights to equal protection, due process, a fair jury trial and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 10, 18(a), and 21 of the Missouri Constitution in that it subjects certain criminal defendants to restrictions on their right to appeal but does not

subject civil litigants or other criminal defendants to these restrictions. Section 494.480.4 also denies and interferes with defendant's right to open access to the Missouri courts of justice for relief and remedy of errors occurring at his trial and thus violates Article I, § 14 of the Missouri Constitution. See ***Kilmer v. Mun***, 17 S.W.2d 545 (Mo. banc 2000). If applied to preclude appellate review of the trial court's action in denying defendant's motion to strike unqualified juror for cause, § 494.480.4 will function as an unconstitutional restriction of the Missouri Supreme Court's supervisory authority. Mo.Const., Art. 1, §§ 2 and 4.1. *See* ***Honda Motor Co., Ltd. v. Oberg***, 512 U.S. 415, 432 (1994) ("denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment").

The restrictions of § 494.480.4, limiting the grounds for granting a motion for new trial or for the reversal of a conviction or sentence, violate the equal protection provisions of the federal and Missouri Constitutions because said restrictions do not apply to civil litigants. Section 494.480.4 applies only to "the accused" in criminal proceedings -- precisely the class of litigant to whom the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution guarantee "the right to ... trial by an impartial jury..."

Article I, § 2 of the Missouri Constitution states that "all persons ... are entitled to equal rights and opportunity under the law..." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The Missouri Constitution requires that legislative classifications have a "reasonable

basis." ***Petitt v. Field***, 341 S.W.2d 106, 109 (Mo. 1960). '"Arbitrary selection can never be justified by calling it classification."' ***Id***.; citations omitted. States may '"treat different classes of persons in different ways"' but may not '"legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."' ***Eisenstadt v. Baird***, 405 U.S. 438, 447 (1972) (citations omitted).

"[R]ules regarding the selection of juries in criminal cases involve an important aspect of a person's treatment in the criminal justice system." ***Myers v. Ylst***, 897 F.2d 417, 421 (9th Cir. 1990). 'A state should not be permitted to treat defendants differently for the purposes of jury selection unless it has "some rational basis, announced with reasonable precision" for doing so"' ***Id***. (citation omitted). Section 494.480.4 violates the Equal Protection Clause because, without a rational basis for so discriminating, §494.480.4 provides that the only class of litigant not permitted relief on appeal from a trial court's erroneous denial of a meritorious motion to strike a juror for cause are criminal defendants at whose trial the juror in question did not serve on the jury and participate in the verdict. The irrational, arbitrary and capricious nature of this legislation is shown by the fact that appellate courts, in ruling on issues involving jury selection and voir dire in criminal cases rely on civil cases. See, e.g., ***State v. Clark***, 981 S.W.2d 143, 147 (Mo. banc 1998) citing ***Littell v. Bi-State Transit Dev. Agency***, 423 S.W.2d 34, 37 (Mo.App., E.D. 1967) ("[I]n civil cases it is proper to probe the minds of prospective jurors to discover prejudice because of sympathy for a child").

The effect of §494.480.4 is that defendant and counsel for the accused in a death

penalty case will be faced with two equally untenable choices. First, defendant and counsel could decline to use a peremptory strike to remove a juror that the defense believes to be unqualified (in a death penalty case this could be an "automatic death juror"). This would permit the defense to seek correction of the erroneous ruling through the motion for new trial and on appeal, but would incur the unacceptable risk that the trial court's error would not be corrected by the trial court or the appellate court. Second, the defense could sacrifice a peremptory strike to remove the unqualified juror. This would obtain a qualified, impartial jury for the defendant's trial, but defendant would lose his rights to seek a remedy from the trial court in the motion for new trial or, in the alternative, to seek a remedy on appeal by asking the appellate court to correct the trial court's erroneous ruling. The total number of times that defendant was forced to use a peremptory strike to remove a juror who should have been removed for cause would effectively reduce defendant's allotment of peremptory strikes while leaving the state's allotment of strikes unaffected.

In actuality, competent counsel facing such a choice must use a peremptory strike to remove those jurors that are the most unqualified or biased. See., e.g., ***Johnson v. Armontrout***, 961 F.2d 748 (8th Cir. 1992); ***State v. Price***, 940 S.W.2d 534 (Mo.App., E.D. 1997); ***State v. McKee***, 826 S.W.2d 26 (Mo.App., W.D. 1992).

A further capricious and arbitrary effect of §494.480.4 - and one that will occur in this case should the Court elect to apply this statute - is that an appellate court will never have the opportunity to review the most erroneous rulings of the trial court with regard to jury selection. Defendant will be denied access to the courts to obtain relief by post-trial

motion or on appeal for the erroneous denial of a challenge for cause of the most biased or unqualified jurors -- who should have been struck for cause -- because to perform effectively, counsel for the accused must use a peremptory strike to remove those jurors that counsel believes to be the most biased. This violates defendant's rights to reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 14, and 21 of the Missouri Constitution. The trial court's erroneous ruling with regard to a challenge for cause will never be reviewed by an appellate court with responsibility for clarifying the law, for providing general and specific guidance to the lower courts, and for ensuring the proper administration of justice in the course of correcting specific erroneous rulings. See, e.g., ***State v. Clark***, *supra*, 981 S.W.2d at 146-48; ***Villines v. Div. of Aging and Missouri Dept. of Social Services***, 722 S.W.2d 939 (Mo.banc 1987); ***Wise v. St. Louis Public Service Co***mpany, 357 S.W.2d 902, 905 (Mo. banc 1962) ("We have decided, in the interest of the proper administration of justice, to eliminate such instructions from our practice. They have tended to confuse rather than clarify the law"); ***Blanford v. St. Louis Public Service Co***., 266 S.W.2d 718, 721 (Mo. 1954) ("Judgments of lower courts are reviewed by appellate courts to correct reversible errors committed by the trial court").

Another arbitrary, capricious and irrational effect of the statute is that in death penalty cases it results in very different treatment of a trial court's erroneous rulings with regard to issues involving death qualification of jurors who do not serve on the jury. The restrictions of §494.480.4 apply only when the juror in question is "on the panel from

which peremptory challenges by the defense are made...." Thus, the statute permits appellate review of the trial court's erroneous ruling in improperly removing for cause, at the behest of the state, a juror who has expressed objections to the death penalty but whose views would not substantially impair his or her ability to follow the law. Yet, §494.480.4 prevents appellate review of the trial court's erroneous ruling in failing to remove for cause a juror whose views on the death penalty would impair his or her ability to follow the law but who has nonetheless been removed by a peremptory strike by the defense.

There is no rational or reasonable basis upon which §494.480.4 a) allows appellate review of the trial court's error in granting the state's motion to remove for cause a qualified juror (one who expressed a preference for life but whose views would not substantially impair his or her ability to follow the law), but b) prohibits review of trial court error in failing to remove for cause a juror whose views in favor of the death penalty would impair his or her ability to follow the law and who was removed from the panel by a peremptory strike by the defense. In both circumstances, the juror in question was one who did not sit on the jury. Section 494.480.4 lacks a reasonable or rational basis for differentiating in its treatment of a) erroneous rulings of the trial court denying a meritorious defense motion to strike for cause that result in a juror being removed by a defense peremptory strike, and b) those erroneous rulings of the trial court improperly granting a state's motion to strike that result in the juror being improperly removed for cause at the request of the state.

Defendant is cognizant that "[t]here is, of course, no constitutional right to an appeal"

and that in Missouri the right to appeal is conferred by statute. ***Jones v. Barnes***, 463 U.S. 745 (1983); ***State v. Williams***, 871 S.W.2d 450, 452 (Mo. banc 1994). But when a state chooses to provide an appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." ***Evitts v. Lucey***, 469 U.S. 387, 393 (1985). "[N]either the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal..." ***Griffin v. Illinois***, 351 U.S. 12, 21-22 (1956), Frankfurter, J., concurring.

Missouri appellate courts have applied the statute to some cases but not to others. In some instances, application of the statute has resulted in appellate review of some of the claims raised on appeal (those where the challenged jurors served on the jury) and the refusal to review other claims (those where the challenged jurors did not serve on the jury). Appellant's research thus far has located the following cases, among others, in which an appellate court has applied the statute to preclude appellate review: ***State v. Jones***, 979 S.W.2d 171, 184-85 (Mo. banc 1998) (although denying review, the Missouri Supreme Court did discuss the merits); ***State v. Nicklasson***, 967 S.W.2d 596 (Mo. banc 1998) (appellate court reviewed claims only as to the three jurors who served on jury and not as to others who did not serve); ***State v. Richardson***, 923 S.W.2d 301 (Mo.banc 1996).

Appellant's research has also disclosed several cases in which an appellate court

declined to apply § 494.480.4 and did conduct appellate review. Cases in which the appellate court did not apply § 494.480.4 include: ***State v. Parker***, 886 S.W.2d 908 (Mo. banc 1994), cert. denied, 115 S.Ct. 1827 (1995); ***State v. Wise***, 879 S.W.2d 494 (Mo. banc 1994), cert. denied, 115 S.Ct. 757 (1995); ***State v. Harris***, 870 S.W.2d 798 (Mo. banc), cert. denied, 115 S.Ct. 371 (1994).

For the foregoing reasons, §494.480.4 violates the Missouri and federal Constitutions and should not be applied to preclude appellate review of the trial court's error in failing to strike juror Clark for cause.

CONCLUSION

For the foregoing reasons, appellant affirms the Conclusion of his initial brief and prays that this Court will reverse the judgment of the circuit court and discharge him, or in the alternative, remand for a new trial or a new penalty phase proceeding, or in the alternative, for imposition of a judgment of second degree murder and resentencing, or, in the alternative, for imposition of a sentence of life imprisonment without possibility of probation or parole for fifty (50) years.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 6,945 words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, first class postage pre-paid, this ___ day of _____, 2001, to Mr. John M. Morris, Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102.

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